No. 80-1971

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1980

NOBLE R. STARNES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Where, of four indicted person, only petitioner was connected with Tri-No Enterprises, Inc. (Tri-No), the property of which was burned, and there was no evidence the other defendants were involved in any way in the conduct of Tri-No's affairs, was not the sole connection between the four an enterprise for wholly illegal purposes, outside the scope of RICO,[1] rather than—as required for conviction—the infiltration of a legitimate business?

A. Is the (alleged) association of the four co-defendants for the illegal purposes alleged in the indictment an "enterprise" under 18 U.S.C. 1961(4)?

B. Should the instant cause be taken on certiorari for consideration together with *United States* v. *Turkette*, 632 F.2d 896 (1 Cir. 1980), *cert. granted*, ... U.S. ....., 49 U.S.L.W. 3525 (No. 80-808, Jan. 27, 1981), wherein this Court has agreed to review the First Circuit's determination that RICO covers only infiltration of legitimate organizations, a holding in conflict with the Seventh Circuit's position as expressed in the instant case and in *United States* v. *Aleman*, 609 F.2d 298 (7 Cir. 1979), that RICO covers the activities of a wholly unlawful association?[2]

C. May affirmance of petitioner's conviction for conspiring to violate 18 U.S.C. 1962(c), in violation

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[1] 18 U.S.C. 1961 et seq., "Racketeer Influenced and Corrupt Organizations," (RICO).

[2] The Eighth Circuit is also aligned with the First Circuit on this issue, in conflict with the Seventh; see *United States* v. *Anderson*, 626 F.2d 1358 (8 Cir. 1980).

of 18 U.S.C. 1962(d), be predicated on the Seventh Circuit's rationale that by burning the building, the others "participated" in Tri-No's affairs?

2. Was the evidence insufficient, as a matter of law, to establish that "*pattern* of racketeering activity" which is an element of the RICO offense, per 18 U.S.C. 1961(5), where a single alleged arson was the basis for the alleged violations of the Travel Act[3] and mail fraud statute[4] asserted to constitute such pattern?

3. Where the federal offense is predicated on intent to violate State law, [an unlawful conspiracy was charged which alleged travel from Indiana to Illinois to commit arson in violation of Illinois law], and the evidence unequivocally demonstrated, at most, prior to the travel, an agreement to burn personal property only—which, without intent to defraud an insurer does not amount to arson under Illinois law[5]—may the Seventh Circuit affirm petitioner's conviction upon indulgence in the unwarranted evidentiary presumption that, in effect, all "businessmen" are charged with knowledge that commercial property is insured?

A. Compatible with due process of law, as per *Leary* v. *United States,* 395 U.S. 6 (1969), is "businessman" a legal term of art entitled to talismanic properties justifying a presumption that a "businessman" knows that commercial property is insured?

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[3] 18 U.S.C. 1952.

[4] 18 U.S.C. 1341.

[5] Ill. Rev. Stat. chap. 38, sec. 20-1, set forth at p. 5, *infra.*

B. Does not any such presumption, eliminating the requirement of proof of a shared intent to defraud an insurer, effectively rewrite the Illinois statute (incorporated within the federal offense) by doing away with the essential element of intent to defraud an insurer?

4. Were petitioner's constitutional rights as delineated by *Brady* v. *Maryland*, 373 U.S. 83 (1963), and/or his rights under the Jencks Act, 18 U.S.C. 3500, violated, where government witness Shurman—an indicted co-defendant who said he participated in the burning—testified he made statements to FBI agents while they were taking notes, and the prosecutor stated the defense "has everything the U.S. Attorney has," not negating that the witness' statements might have been in the possession of the police or FBI?

A. Is the prosecutor's response adequate to safeguard petitioner's rights?

B. May the Seventh Circuit avoid deciding this issue on the basis that there was nothing to suggest that the notes could be in some way material to issues involved in the case, where the defense did not have access thereto because of the prosecutor's inadequate response, and the witness involved was a crucial government occurrence witness?

Parties Involved *

In addition to petitioner, co-defendant Clifford Roland was also a party to the proceeding in the court whose judgment is sought to be reviewed. The other defendants did not appeal. (See footnotes 6 & 7, *infra*.)

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* As per Rule 21.1(b).

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1. Where, of four indicted persons, only petitioner was connected with Tri-No Enterprises, Inc. (Tri-No), the property of which was burned, and there was no evidence the other defendants were involved in any way whatsoever in the conduct of Tri-No's affairs, the sole connection between the four was an enterprise for wholly illegal purposes, outside the scope of RICO, rather than—as required for conviction—the infiltration of a legitimate business. Certiorari should be allowed so that this Court may resolve the conflict between the Circuits demonstrated by comparing the instant case with *United States v. Turkette*, 632 F.2d (1 Cir. 1980), cert. granted, ... U.S. ....., 49 U.S.L.W. 3525 (No. 80-808, Jan. 27, 1981), wherein the Court has agreed to review the First Circuit's decision that

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RICO covers only infiltration of legitimate organizations, a holding in conflict with the Seventh Circuit's position as expressed in the instant case and in *United States* v. *Aleman*, 609 F.2d 298 (7 Cir. 1979), that RICO covers the activities of a wholly unlawful association. Certiorari should be allowed to insure a uniform interpretation of the statute as to the issue whether the alleged association of persons for wholly illegal purposes is an "enterprise" under 18 U.S.C. 1961(4) .. 10

2. The evidence was insufficient, as a matter of law, to establish that "pattern of racketeering activity" which is an element of the RICO offense, per 18 U.S.C. 1961(5), where a single alleged arson was the basis for the alleged violations of the Travel Act and mail fraud statute asserted to constitute such pattern. Certiorari should be allowed so that the Court may consider the proper statutory meaning of "pattern", specifically, here, whether a single alleged arson, however designated, may amount to a "pattern" within the meaning of 18 U.S.C. 1962(c), as defined by 18 U.S.C. 1961(5) 12

3. Where the federal offense is predicated on intent to violate State law, [here, an unlawful conspiracy was charged which alleged travel from Indiana to Illinois to commit arson in violation of Illinois law], and the evidence unequivocally demonstrated, at most, prior to the travel, an agreement to burn personal property only—which, without intent to defraud an insurer, does not amount to arson under Illinois law—the reviewing court may not affirm petitioner's conviction upon indulgence in the unwarranted evidentiary presumption that, in effect, all "businessmen" are charged with knowledge that all commercial property is insured; such presumption violates due process of law and unjustifiably rewrites the State statute 16

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A. "Businessman" is not a legal term of art entitled to talismanic properties justifying a presumption that a "businessman" knows that commercial property is insured; such presumption, lacking a rational basis, offends due process of law under such holdings as *Leary* v. *United States*, 395 U.S. 6 (1969) 17

B. Any such presumption, eliminating the requirement of proof of a shared intent to defraud an insurer, effectively rewrites the Illinois statute (incorporated within the federal offense) by doing away with the essential element of intent to defraud an insurer 17

4. Petitioner's constitutional rights as delineated by *Brady* v. *Maryland*, 373 U.S. 83 (1963), and/or his rights under the Jencks Act, 18 U.S.C. 3500, were violated, where government witness Shurman—an indicted co-defendant who said he participated in the burning—testified he made statements to FBI agents while they were taking notes, and the prosecutor stated the defense "has everything the U.S. Attorney has," not negating that the witness' statements might have been in the possession of the police or FBI. Under these circumstances:

A. The prosecutor's response was inadequate to safeguard petitioner's rights;

B. The reviewing court may not avoid deciding this issue on the basis there was nothing to suggest that the notes could be in some way material to issues involved in the case, where the defense did not have access thereto because of the prosecutor's inadequate response, and the witness in question was a crucial government occurrence witness 24

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NO.

NOBLE R. STARNES,

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VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Noble R. Starnes, prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit, to review its decision affirming his conviction for conspiring to engage in a pattern of racketeering in connection with a scheme to commit arson with intent to defraud an insurer, in violation of 18 U.S.C. § 1962(d), a provision of the Racketeer Influenced and Corrupt Organizations Act (RICO).

Judgment and Opinion Below

The opinion of the Court of Appeals for the Seventh Circuit, No. 80-1437, is not yet reported. A copy is attached as Appendix A, per Rule 21.1(k)(i) of this Court.

Jurisdictional Statement

On March 20, 1981, the Seventh Circuit filed its opinion affirming the judgment of the United States District Court for the Eastern District of Illinois, Benton Division, finding petitioner guilty as charged. (App. A) Petitioner's timely petition for rehearing was denied on April 21, 1981. (App. B) This Petition is timely filed within 60 days after entry of judgment by a federal court of appeals, as provided in Rule 20.1. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall . . . be deprived of . . . liberty . . . without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

18 U.S.C. 1341 (mail fraud) is involved by reference, but there is no issue here as to the interpretation of this section.

18 U.S.C. 1952 ("Travel Act") provides in pertinent part:

"(a) Whoever travels in interstate . . . commerce or uses any facility in interstate . . . commerce, including the mail, with intent to— . . .

* * *

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified . . . [above], shall be fined not more than $10,000 or imprisoned for no more than five years, or both.

(b) As used in this section 'unlawful activity' means . . . (2) . . . arson in violation of the laws of the State in which they are committed or of the United States."

18 U.S.C. 1961 ("RICO") provides in pertinent part:

"Definitions

As used in this chapter:

(1) 'Racketeering activity' means (A) any act . . . involving . . . arson . . . which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), . . . section 1952 (relating to racketeering) . . .

* * *

(4) 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) 'pattern of racketeering activity' requires at least two acts of racketeering activity . . ."

18 U.S.C. 1962 ("RICO") provides in pertinent part:

"Prohibited Activities

* * *

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate . . . commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . .

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section."

18 U.S.C. 3500 provides:

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * *

(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Ill. Rev. Stat., 1979, Chap. 38, Sec. 20-1 ("Arson") provides, in pertinent part:

> "A person commits arson when, by means of fire or explosive, he knowingly:
>
> (b) With intent to defraud an insurer, damages any property or any personal property having a value of $150 or more."

STATEMENT OF THE CASE

Basis for Federal Jurisdiction

Petitioner was indicted for having violated a federal criminal statute, 18 U.S.C. 1962(d). The basis for federal jurisdiction in the court of first instance is 18 U.S.C. § 3231.

Nature of the Case

Petitioner, Noble Starnes, was charged in only Count 1 of a 2-count indictment with having conspired with three other defendants in violation of 18 U.S.C. 1962(d), continuously from on or about February 1, 1978 until the return of the indictment.[6] Specifically, Count 1 charged that defendants conspired to use a pattern of racketeering activity in the conduct of the affairs of an enterprise engaged in interstate commerce,[7] in that the other three co-defen-

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[6] Indicted with petitioner were Gerald Shurman, Clifford Roland, and Donald Murphy. Roland went to trial with defendant, while Shurman and Murphy (having theretofore pleaded guilty to Counts 1 and 2, respectively), testified against them.

[7] Count 2 charged the other three defendants with violation of the Travel Act, 18 U.S.C. 1952(a)(3). See Tr. 181-85. "R." refers to the Record on Appeal, and "Tr." to the Transcript of Proceedings.

The "enterprise" as alleged throughout the indictment is, per the government's theory of the case, Tri-No Enterprises, Inc. See Count 1, pars. 3, 4 & 5, App. A, p. 9.

dants would travel in interstate commerce (from Gary, Indiana to Herrin, Illinois) to commit an arson in violation of Illinois law; that two of them[8] would commit the said arson; that petitioner, as president of Tri-No Enterprises, Inc., a corporation engaged in interstate commerce, would make a false claim for damages on behalf of the said company, under a certain insurance policy; and that petitioner would commit mail fraud in violation of 18 U.S.C. 1341 by causing certain things to be delivered by mail as a part of the said conspiracy to defraud the insurance company via the false claim. (R. 1-16)

Petitioner's motions for directed finding at the close of the government's case (R. 13) and at the close of all the evidence were denied, and the jury found him guilty as charged. He was sentenced to 6 years and fined $5000.00. (R. 20) The Seventh Circuit affirmed. (App. A)

Statement of Facts

All facts essential to understanding and resolution of the questions presented by this Petition are contained in the Court of Appeals' opinion, App. A, and are not repeated here to avoid unnecessary duplication. To supplement, the pertinent facts are briefly stated below:

Donald Murphy testified for the government that he met with defendants Roland and Gerald Shurman in Gary, Indiana on February 12, 1978 and Roland "said something about burning an office." (Tr. 139-40) They talked about burning a mining office. (Tr. 142) Later, on February 18, 1978, there was another discussion about going to southern Illinois. It was only after they had driven

[8] To wit, Shurman and Murphy.

from Gary, Indiana to Sesser in southern Illinois that they met with petitioner Starnes and then went to Herrin, Illinois. (Tr. 150) It was only then that he remembered Starnes saying, "Well, I want it completely destroyed." (Tr. 151) Shurman was siphoning gas out of a car in order to get fuel in addition to the lacquer thinner they bought in Indiana. (Tr. 153) They then purchased gas at a gas station. (Tr. 153-54)

Roland paid Murphy and Shurman $1,400 and said that he would guarantee the balance. (Tr. 155)[9]

Gerald Shurman testified for the government that he had met with Roland in a Gary, Indiana nightclub on February 12, 1978, and talked about an office fire to destroy records relating to coal miners. "The fire was—at the time it was talked about, was going to be an office fire to destroy records and was to—it was related to the coal miners, either their office complex or related to their whereabouts, you know. What area I did not know at the time." (Tr. 247) He got Donald Murphy to help and gave Murphy $100 to buy lacquer thinner, which money he had obtained from Roland in Indiana a week before. When they drove to southern Illinois with the lacquer thinner, they met with Starnes near Sesser, Illinois and then drove with Starnes to a building near Christopher, Illinois. (Tr. 253-54) They went to a building and Starnes said he wanted the whole building destroyed — that "it was no longer a situation where the office was to be burned and destroyed, but the

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[9] Shurman pleaded guilty to Count 1, and Murphy to Count 2. Both were awaiting sentence when they testified at petitioner's trial. See Tr. 181-85, footnote 6, *supra*. They acknowledged they expected their sentencing to be contingent on how well they "cooperated" with the prosecution in their testimony against petitioner and Roland. (Tr. 181-85; 274-75) The government promised not to proceed against them on the remaining respective count against each.

whole building was supposed to be destroyed." (Tr. 254) Shurman said, "Okay, I agree." (Tr. 255)

He and Murphy and Roland decided to siphon some gasoline out of the camper "because of the amount of lacquer thinner that we purchased. It wouldn't be enough fluid to cause a big enough fire to burn the building down so that we decided we needed 34 gallons of gas to add to it." (Tr. 255-56)

He and Murphy were not aware they were going to burn the whole building, just "to burn the records and things of the United Mine Workers because a strike was supposed to end that Monday or Tuesday of that week and we weren't prepared and we didn't know that they wanted the whole building burned down, and the impression—the thoughts they related to me—that was only the intention—was to make obvious that the mine workers would be blamed for it and that's why we were not prepared. We didn't have the proper . . ." (Tr. 258)

On February 19, 1978 Shurman and Murphy burned this building, used by Tri-No Enterprises, Inc., of which petitioner Starnes was President. (Tr. 109)

Before the fire, Roland paid Shurman $1,400 stating ". . . that was all that Mr. Starnes could come up with." (Tr. 262) He split the money with Murphy. (Tr. 263) The next day Roland told him there would be no more money because there wasn't much damage done to the building.

Weeks later, back in Indiana, he talked to Roland several times about the balance of the money. Several weeks later, he found out the building had substantial damage, in the neighborhood of $200,000 and that a private adjuster had come in. (Tr. 263-64) Roland indicated there was additional damage to the building and said that ". . . the

money would be given after the insurance settlement was made on the building." (Tr. 264) He did not receive the rest of the money. (Tr. 264)

Petitioner processed an insurance claim for damages due to the burning of the building owned and used by Tri-No Enterprises, Inc. (Tr. 113-15)

During the trial, government witness Shurman testified that FBI agents were taking notes when he made statements to them. The defense demanded them as no such statements had been given to the defense. The government was relieved by the court of any further responsibility when the prosecutor stated, "[The defense] has everything the U.S. Attorney has." (Tr. 315)

All other facts necessary to an understanding and resolution of the issues raised herein are set forth in the course of the Argument, as and when pertinent.

REASONS FOR GRANTING THE WRIT

1.

Where, of four indicted persons, only petitioner was connected with Tri-No Enterprises, Inc. (Tri-No), the property of which was burned, and there was no evidence the other defendants were involved in any way whatsoever in the conduct of Tri-No's affairs, the sole connection between the four was an enterprise for wholly illegal purposes, outside the scope of RICO, rather than—as required for conviction—the infiltration of a legitimate business. Certiorari should be allowed so that this Court may resolve the conflict between the Circuits demonstrated by comparing the instant case with United States v. Turkette, 632 F.2d (1 Cir. 1980), cert. granted, ... U.S. ....., 49 U.S.L.W. 3525 (No. 80-803, Jan. 27, 1981), wherein the Court has agreed to review the First Circuit's decision that RICO covers only infiltration of legitimate organizations, a holding in conflict with the Seventh Circuit's position as expressed in the instant case and in United States v. Aleman, 609 F.2d 298 (7 Cir. 1979), that RICO covers the activities of a wholly unlawful association.* Certiorari should be allowed to insure a uniform interpretation of the statute as to the issue whether the alleged association of persons for wholly illegal purposes in an "enterprise" under 18 U.S.C. 1961(4).

In direct conflict with *United States* v. *Anderson*, 626 F.2d 1358 (8 Cir. 1980), and *United States* v. *Turkette*, 632

* Also aligned with the First Circuit on this issue is the Eighth; see *United States* v. *Anderson*, 626 F.2d 1358 (8 Cir. 1980).

F.2d 896 (1 Cir. 1980), *cert. granted,* ..... U.S. ....., 49 U.S.L.W. 3525 (No. 80-808, Jan. 27, 1981), the Seventh Circuit has decided, in conformity with its prior decision in *United States* v. *Aleman,* 609 F.2d 298 (7 Cir. 1979), that associations—as at bar—for purely illegitimate purposes, are included within RICO coverage.

Under the view of the First and Eighth Circuits in the above cases, the association of persons—(as per the government's theory here)—for an entirely illegitimate purpose, is *not* an "enterprise" within the statute. Here, while (per the government's position) Tri-No, a legitimate business, was the "enterprise" involved,[10] there was no evidence to support the conclusion that any of the defendants infiltrated or participated—directly or indirectly—in the affairs of the said business. Their association (*arguendo*) was *solely* for the illegitimate purpose of the single event of the burning. Thus, their association does not qualify as an "enterprise."

Considering that certiorari has been granted in *Turkette,* and since a slightly different aspect of the "enterprise" issue is presented here (with respect to whether the defendants' involvement in the burning amounts to participation in the affairs of the legitimate business, Tri-No), certiorari should be allowed so as to resolve completely the perplexing conflict amongst the Circuits.

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[10] See App. A, p. 9.

2.

The evidence was insufficient, as a matter of law, to establish that "pattern of racketeering activity" which is an element of the RICO offense, per 18 U.S.C. 1961(5), where a single alleged arson was the basis for the alleged violations of the Travel Act and mail fraud statute asserted to constitute such pattern. Certiorari should be allowed so that the Court may consider the proper statutory meaning of "pattern", specifically, here, whether a single alleged arson, however designated, may amount to a "pattern" within the meaning of 18 U.S.C. 1962(c), as defined by 18 U.S.C. 1961(5).

Under the due process standard recently set out by this Court in *Jackson* v. *Virginia,* 443 U.S. 307 (1979), even taking all the evidence most favorably to the government, no reasonable jury could have concluded that defendants participated in a "pattern" of racketeering activity as defined by law. In *Jackson* Your Honors held that a defendant's conviction should be reversed if, viewing the evidence in the light most favorable to the prosecution, upon the record evidence at trial, no rational trier of fact could have found proof of guilt beyond a reasonable doubt in terms of the substantive elements of the offense. *Id.* at 324.

* * *

Under RICO, a "pattern" of racketeering activity requires at least two acts of racketeering activity, 18 U.S.C. 1961(5); and "racketeering activity," in turn, is defined in 18 U.S.C. 1961(1) to include arson in violation of state law, violation of the Travel Act (18 U.S.C. 1952), and mail fraud (18 U.S.C. 1341).

Here, the government has taken a single alleged arson, and managed to fragment it, both in the indictment and

in the presentation of the case to the jury, to assert not only arson, but also violation of the Travel Act and mail fraud, in an attempt to render that *single* alleged arson a "pattern" of racketeering activity, an essential element of the offense of which petitioner stands convicted. 18 U.S.C. 1962(c) & (d).

Without intent to defraud an insurer, there is no arson under Illinois law when one causes one's own property to be burned. Ch. 38, Sec. 20-1(b) Ill. Rev. Stat., 1979. However, by asserting mail fraud in the attempt to process the allegedly false claim, the government has taken a necessary element of arson—*i.e.*, intent to defraud, without which there is no arson in violation of State law—and improperly made it serve doubly so as to form the basis both of arson and of mail fraud. Thus, the alleged mail fraud is inextricably intertwined with the act of arson itself, if arson there was.

In other words, if the burning was arson, the use of the mails in the attempt to effectuate the fraudulent purpose was an essential ingredient of that said arson, not—as the government would have it—an *additional* "act of racketeering activity" from which a "pattern" could be found to exist.

By the same token, the act of travel to effectuate the alleged arson cannot qualify as an additional act so as to meet the government's burden of proving a "pattern"; for when the travel is for purposes of effectuating a particular unlawful act (here, arson), such travel cannot be compounded with the act itself to become a "pattern." Any contrary holding renders meaningless the statutory definition of a "pattern." For if travel to commit the

arson be "racketeering activity," and the arson also be so characterized, then any successfully consummated violation of the Travel Act automatically renders the perpetrator also guilty of a RICO violation, for the travel and the unlawful activity together would then constitute two acts.

Such result of fracturing and compounding single acts so as to subject a defendant to the added onus of illogical multiple prosecutions must not be countenanced.[11]

• • •

Relying on a single Seventh Circuit decision, *United States* v. *Weatherspoon*, 581 F.2d 595, 601-02 (7 Cir. 1978), the appeals court has ruled that although but a single objective—the burning—was involved, the separate acts[12] here alleged amount to a "pattern" within the definition; per the court, "Each is a separate act of racketeering."[13]

The Seventh Circuit—in *Weatherspoon*, and again at bar—has taken a position at odds with that taken by other

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[11] The reason for such machinations clearly lies in the respective penalties for the offenses; for a defendant charged only with a violation of the Travel Act faces a possibility of 5 years imprisonment, while he who is charged with a RICO violation faces up to 20 years. (See statutes, pp. 2-4, *supra*.)

[12] "Under RICO, the conspiratorial *objective* is a matter different than the *acts* contemplated by the conspirators. Those acts in this case include Roland's travelling with Shurman and Murphy from Indiana to Illinois so they could set the fire in order to defraud the insurer; actually setting the fire in order to defraud the insurer; and then using the mails to complete the fraudulent scheme." (App. A, p. 7) (Emphasis in original.)

[13] App. A, p. 7.

courts which have addressed themselves to the meaning of "pattern" in the RICO context.[14]

Because of this conflict between the instant opinion and other judicial decisions construing the pertinent statutory language, this Court should consider the issue to insure uniformity of interpretation of the federal criminal law.

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The reviewing court inexplicably has put RICO in a class by itself vis á vis the normally applicable rules of statutory construction—specifically, those most basic tenets involving the strict interpretation of criminal statutes in favor of the accused,[15] and that "doubt will be resolved

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[14] That a single, isolated event does not qualify as a "pattern" is supported by the following decisions: *United States* v. *Chovanec*, 467 F.Supp. 41, 44 (S.D.N.Y. 1979) ("pattern . . . embraces criminal acts that . . . are not isolated events"); *United States* v. *White*, 386 F.Supp. 882, 883-84 (E.D. Wis. 1974) (pattern implies "a consistent or characteristic arrangement"; "absent a showing of a 'pattern' or interrelatedness of such activity, Sec. 1962(c) could be used against . . . isolated acts . . . such was not the intended targets of the challenged statute."); *cf. United States* v. *Ladmer*, 429 F.Supp. 1231, 1244-45 (E.D.N.Y. 1977); *United States* v. *Stofsky*, 409 F.Supp. 609, 614 (S.D.N.Y. 1973). The Seventh Circuit's peripheral reliance on *Stofsky, supra*, (App. A, p. 7) and *Chovanec, supra*, (App. A, p. 8), is misplaced, upon careful reading of these cases, both of which were relied on by defendant below. See also *United States* v. *Anderson*, 626 F.2d 1358, 1371 (8 Cir. 1980), dictum quoted at App. A, p. 8.

[15] "Statutes creating crimes are to be strictly construed . . ." *United States* v. *Resnick*, 299 U.S. 207, 209 (1936). *Accord*, *Smith* v. *United States*, 360 U.S. 1, 9 (1959); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1971); *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 n.3 (1972); see also TRIBE, AMERICAN CONSTITUTIONAL LAW 718-19 (1978).

against turning a single transaction into multiple offenses." [16] In particular, the court has refused to be guided by the philosophy underlying this Court's recent decision in *Busic* v. *United States*, 446 U.S. 398 (1980).[17]

The Seventh Circuit's decision—fragmenting a single event into a "pattern" so as to impose federal criminal liability on what was, at most, essentially a local offense, if any, in the face of judicial philosophy and rules of statutory construction requiring the opposite conclusion—should be scrutinized by this Court on certiorari.

3.

Where the federal offense is predicated on intent to violate State law, [here, an unlawful conspiracy was charged which alleged travel from Indiana to Illinois to commit arson in violation of Illinois law], and the evidence unequivocally demonstrated, at most, prior to the travel, an agreement to burn personal property only—which, without intent to defraud an insurer, does not amount to arson under Illinois law*—the reviewing court may not affirm petitioner's conviction upon indulgence in the unwarranted evidentiary presumption that, in effect, all "businessmen" are charged with knowledge that all commercial property is insured; such presumption violates due process of law and unjustifiably rewrites the State statute.

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[16] *Simpson* v. *United States*, 435 U.S. 6, 15 (1978), quoting from *Bell* v. *United States*, 349 U.S. 81, 84 (1955). *Accord*, *Ladner* v. *United States*, 358 U.S. 169 (1958); *Prince* v. *United States*, 352 U.S. 322 (1957); *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952).

[17] App. A, pp. 10-11, n.7. While *Busic* is not squarely on point, its underlying philosophy does, we submit, support petitioner's position here. The court's summary decision that "There is no *Busic* situation implied by the facts of this case," (App. A, p. 11, n.7), ignores the principles underlying that decision.

* Ill. Rev. Stat. 1979, chap. 38, Sec. 20-1, set out at p. 5, *supra*.

A. "Businessman" is not a legal term of art entitled to talismanic properties justifying a presumption that a "businessman" knows that commercial property must be insured; such presumption, lacking a rational basis, offends due process of law under such holdings as Leary v. United States, 395 U.S. 6 (1969).

B. Any such presumption, eliminating the requirement of proof of a shared intent to defraud an insurer, effectively rewrites the Illinois statute (incorporated within the federal offense) by doing away with the essential element of intent to defraud an insurer.

Even according to the government's witnesses, the scope of the original agreement between themselves and Roland included *only* the burning of certain office records for the purpose of discrediting a labor union. (Tr. 247, 258)

Not until *after* Shurman and Murphy traveled to Illinois from Indiana for the purpose of carrying out this agreement were the terms expanded to include the burning, not only of the records, but also of the building containing the office. (Tr. 254, 258) More gasoline was procured for this purpose because the lacquer thinner Shurman and Murphy brought from Indiana was not enough fluid to burn the building down. (Tr. 255-56)

And not until *after* the burning, when Shurman and Murphy demanded payment of the balance still due them, was insurance mentioned; for at that time—for the first time—back in Indiana—an insurance claim was discussed, when Roland advised them they would receive the final balance due after collection of the insurance proceeds. (Tr. 263-64)

Prerequisite to finding petitioner guilty of conspiracy under 18 U.S.C. 1962(d)—the only charge against him—is a finding that a State law felony was involved as alleged. Per the indictment, an unlawful conspiracy was charged, which involved travel from Indiana to Illinois *to commit arson in violation of Illinois law.*

However, because the agreement before Shurman and Murphy departed from Indiana involved only the burning of office records to discredit a union—with no insurance purposes set forth, overtly or implicitly—the evidence was insufficient to demonstrate an agreement to travel to Illinois to commit arson as defined by State law.

Under Illinois law, (see statute, set forth at p. 5, *supra*), the burning of the property of another with his consent—as alleged in the instant case—is *not* arson unless it is done with intent to defraud an insurer. Since there was no agreement to burn the building, as opposed to burning merely the office records, until after certain of the defendants traveled from Indiana to Illinois—and no inkling of any intent to make an insurance claim until well after the burning itself had been consummated—no crime of arson was contemplated under Illinois law.

Here, while alleged violations of the Travel Act (18 U.S.C. 1952) and the Mail Fraud statute (18 U.S.C. 1341) are also set forth as parts of the conspiracy, underlying these violations, too, is arson in violation of State law. Without *an agreement to travel to commit arson* as alleged in pars. 2 and 3 of Count 1, there was no violation of the Travel Act; and without *an agreement to defraud* (pursuant to the said arson as statutorily defined) there could be no mail fraud as alleged in par. 5, in the presentation of an alleged false claim as alleged in par. 4. (See Indictment R. 1-16.)

In other words, the government's case entirely depended upon proof of arson as defined by State law.[18]

But because, even taking the evidence most favorably to the government, the initial agreement encompassed *only* a burning which did not amount to arson under Illinois law, and because defrauding of an insurer did not enter the picture until after the burning had actually taken place, there was no proof of a conspiracy to commit arson as defined by State law. Therefore, under the pertinent statutes, the evidence was entirely lacking as to an essential element of the offense with which petitioner was charged, that is, 18 U.S.C. 1962(d).[19]

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[18] In *United States* v. *Forsythe*, 594 F.2d 947 (3 Cir. 1979), defendants were charged with conspiracy in violation of 18 U.S.C. 1962(d). Rejecting their contention that the jury should have been charged on the elements of a lesser included State offense, the reviewing court stated:

> "*[I]f the defendant is not guilty of a state law felony, he is guilty of no federal crime.* . . . The court properly charged that the government had to prove each element of the predicate felony before the defendant could be found guilty of anything." *Id.* at 952. (Emphasis added.)

[19] See also *United States* v. *Mennuti*, 639 F.2d 107 (2 Cir. 1981), affirming dismissal of an indictment under a different section of RICO [18 U.S.C. 844(i)] on grounds that destruction of two private residences by means of an explosive did not constitute destruction of a building "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." *Id.* at 109. While the section involved is different—Starnes was convicted under sec. 1962(d) for a conspiracy to travel from Indiana to Illinois to commit arson as defined by Illinois law, a section not containing the same "interstate" nexus as that involved in *Mennuti, supra,*—the Appeals' Court's reasoning in affirming dismissal there is instructive.

Significantly, the court stated "that Congress did not choose, as

(footnote continued)

The Seventh Circuit agrees that Roland's "intent to defraud an insurer" is essential to Starnes' RICO conviction. (App. A, pp. 5-6) Unless Roland shared Starnes' intent to defraud an insurer, Starnes could not be guilty of a conspiracy so to do with Roland.[20]

The Seventh Circuit relies on two different types of reasoning to conclude there was sufficient evidence from which

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(footnote continued)

the Government contends, to make nearly every bombing in the country a federal offense . . ." *Id.* at 113.

Noting that "The legislative history . . . does not afford the slightest indication that Congress intended to punish all arson schemes," *id.* at 113 n.4, the reviewing court applied principles of statutory construction as stated by this Court, that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,' " *id.* at 113, quoting from *Rewis* v. *United States,* 401 U.S. 818, 812 (1971), and that " 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definitive'." *Ibid.,* quoting from *United States* v. *Universal C.I.T. Credit Corp.,* 344 U.S. 218, 221-22 (1952), and referring also to *United States* v. *Bass,* 404 U.S. 336, 347-49 (1971).

[20] If the two non-appealing co-defendants, Shurman and Murphy, had the requisite intent, they did not formulate it until *after* the interstate travel; see pp. 6-7, *supra,* detailing evidence at Tr. 254-56, 258. The reviewing court thus properly assumes that to sustain Starnes' conspiracy conviction—regardless of Starnes' own state of mind, see App. A, pp. 5-6—the jury had to find "that Roland intended to defraud Starnes's insurer." (App. A, p. 6) Thus, though there were two additional persons convicted for violation of the Fraud Act, see fn. 7, *supra,* Starnes' conviction can be supported *only* if Roland, too, knew—*before* the travel—that the fire was for purposes of defrauding an insurer.

Starnes' guilt cannot be predicated upon the state of mind of either Shurman or Murphy.

the jury could properly conclude that Roland intended to defraud Starnes' insurer: (1) inferences from Roland's relationship with Starnes, and (2) presumptions arising from Roland's having been a "businessman."

All the details concerning their relationship, even taken together, are insufficient as a matter of law to support the requisite finding. Indeed, the reviewing court so much as admits this; for after detailing this evidence,[21] the court states:

> "This evidence *suggests* that Roland was privy to Starnes' reasons for setting the fire." (App. A, p. 5) (Emphasis added.)

Evidence which merely "suggests" an essential element of the offense obviously is insufficient as proof of such element, as a matter of law.[22]

Grasping for proverbial straws, the court reveals that, lo and behold, Roland is a "businessman."[23] From this

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[21] This evidence was: that Starnes and Roland were seen together in Roland's bar "long before the arson was contemplated"; that Roland was the "middle man" who hired the "torchers"; and that Roland was in phone contact with Starnes. (App. A, p. 5)

[22] See *Jackson* v. *Virginia,* 443 U.S. 307 (1979), discussed at p. 12, *supra.*

[23] There was evidence Roland operated a tavern and conducted a legitimate demolition business. (App. A, p. 2) From this, the court presumes facts essential to establish Roland's state of mind as to the Illinois offense underlying the RICO offense.

The status of being "a businessman" is not sufficiently defined as a term of art in legal usage to warrant what the court has done here. The record does not contain adequate evidentiary facts concerning Roland's "businessman-hood" to justify the tremendous mental leaps indulged in by the reviewing court.

fact—whatever it may mean—the court proceeds to presume "he knew that commercial buildings usually are insured,"[24] and—presumption upon presumption—"that it must have been obvious to Roland that Starnes would not be paying him to cause him [Starnes] great financial loss by burning his own business down for some farfetched public relations gimmick, or any other reason, unless Starnes had insurance to cover the property loss and otherwise make it all financially worthwhile."[25]

* * *

The Seventh Circuit's indulgence in this presumption, necessary to affirm petitioner's conviction, is constitutionally infirm for at least two reasons:

First, there is no rational connection between the fact proved and the fact presumed, rendering the presumption violative of due process of law. See, *e.g., Leary* v. *United States*, 395 U.S. 6 (1969). This is particularly conspicuous here, where the accoutrements of the "proven"—*i.e.*, being a "businessman"—are undefined.[26]

Second, the court's decision amounts to rewriting the Illinois statute, a diversion no federal court is entitled to practice under any healthy approach to federalism.[27]

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[24] App. A, p. 5.

[25] App. A, pp. 5-6. The court also notes that there was no suggestion from the testimony that Roland was surprised an insurance claim was involved. However, this negative inference from a lack of suggestion, arising several weeks after the blaze, contributes nothing to the hard facts.

[26] See footnote 21, p. 21, *supra*.

[27] See *Jackson* v. *Virginia*, *supra*, 443 U.S. at 324 n.16.

By creating such unwarranted inferences, nay, presumptions, concerning circumstances from which a person may be assumed to know that someone else's property is insured, the court has rewritten the Illinois statute. Under the court's interpretation of the evidence, "intent to defraud an insurer"—an essential element of the offense of arson under Illinois law, conspiracy to violate which is, here, the basis of the RICO offense—automatically exists whenever a commercial building is involved and the accused is a "businessman," whatever that may be.

Such a reading of the statute effectively eliminates the requirement of proof that Roland knew the fire was caused with intent to defraud an insurer. There is no suggestion that any Illinois decision ever has so construed the section. The federal court is not the proper vehicle to rewrite the Illinois statute.

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We realize this Court is inundated with petitions for certiorari, and can expect that claims of insufficiency of the evidence to sustain conviction are usually regarded as not worthy of review. But this is not a "garden variety" insufficiency claim; rather, it involves the improper use of an unconstitutional presumption, formulated by the federal court in an unwarranted revision of State law. Due to the ever-increasing use of RICO by federal prosecutors, it behooves this Court to nip in the bud the dangerous practice reflected by the instant opinion.

4.

Petitioner's constitutional rights as delineated by Brady v. Maryland, 373 U.S. 83 (1963), and/or his rights under the Jencks Act, 18 U.S.C. 3500, were violated, where government witness Shurman—an indicted co-defendant who said he participated in the burning — testified he made statements to FBI agents while they were taking notes, and the prosecutor stated the defense "has everything the U.S. Attorney has," not negating that the witness' statements might have been in the possession of the police or FBI. Under these circumstances:

A. The prosecutor's response was inadequate to safeguard petitioner's rights;

B. The reviewing court may not avoid deciding this issue on the basis there was nothing to suggest that the notes could be in some way material to issues involved in the case, where the defense did not have access thereto because of the prosecutor's inadequate response, and the witness in question was a crucial government occurrence witness.

Government witness Shurman was one of the "testifying torchers." He had been interviewed on a number of occasions (possibly ten) by the FBI, on at least three or four of which notes were taken by his interrogator. (Tr. 314-15) When the defense demanded production of such notes, the government attorney responded:

> "They [the defense] have every piece of information that the United States Attorney's Office has, Your Honor . . ." (Tr. 315)

Although defense counsel argued that the witness said there were more, the court, accepting the prosecutor's statement as relieving the government of any further re-

sponsibility, violated petitioner's rights under the Jencks Act (18 U.S.C. 3500) and as delineated by *Brady* v. *Maryland*, 373 U.S. 83 (1963).

The prosecutor's statement, quoted above, does not negate that notes taken per Shurman's testimony may have existed in the possession of the police or FBI, *i.e.*, a prosecuting agency other than the U.S. Attorney's Office as such. Such possibility being a real one, the government's burden was not discharged.

It makes no difference if the withholding of possibly exculpatory evidence is done by officials other than the prosecutor himself. *Barbee* v. *Warden*, 331 F.2d 842, 846 (4 Cir. 1964); see *Pyle* v. *Kansas*, 317 U.S. 213 (1942); *Curran* v. *Delaware*, 259 F.2d 707 (3 Cir. 1958).

Since the witness Shurman's testimony, uncontradicted, established that notes were taken when he was being interviewed by the FBI, it was incumbent on the government to produce same to allow the petitioner to determine whether they qualified as "statements" discoverable under the Jencks Act. Similarly, not until the notes could be viewed could the determination be made whether or not they contained possibly exculpatory material within the purview of *Brady, supra.*

Since a defendant's right to material pursuant to *Brady* principles and under the Jencks Act extends to material in the possession of law enforcement personnel beyond merely the prosecutor himself, the prosecutor's statement in the case at bar, that the defense had been provided with everything the U.S. Attorney's Office has, was insufficient to safeguard petitioner's rights.

In *United States* v. *Harrison*, 524 F.2d 421 (D.C. 1975), the court held that rough interview notes taken by FBI agents interviewing key witnesses fall within the category

of potentially discoverable materials required to be preserved and produced. Although the court did not see fit to impose sanctions under the circumstances, it clearly held such notes producible, in the course of a scholarly opinion considering, *inter alia*, the interrelationship between the Jencks Act and the constitutional requirement as set forth by this Court in *Brady, supra.*

The Seventh Circuit's position that nothing in the record suggests the notes could be in some way material to the issues involved in the case, (App. A, p. 12), is belied by Shurman's crucial position as a prosecution occurrence witness coupled with Shurman's own testimony that FBI agents were taking notes while interviewing him. It must not be defendant's burden, in these circumstances, to demonstrate materiality; common sense is stymied if in such event there is not, at least for present purposes, a preliminary inference of materiality, based on the witness' testimony and position in the case.

And the reviewing court's gratuitous assumption that the notes did not come within the scope of the Jencks Act, (App. A, p. 13), is similarly unrelated to reality, in terms of the factual situation here spread of record.

The Seventh Circuit declines to reach the issue, claiming insufficient factual basis whereby to rule. (App. A, p. 12) This Court should grant certiorari, not only to resolve the important constitutional and statutory issues here raised with respect to the sufficiency of the prosecutor's response, but also to require the federal reviewing courts to decide ripe issues.

• • •

Because the trial court did not adequately protect petitioner's rights, once it became evident that government witness Shurman's statements to the FBI were the sub-

ject of notes taken by FBI agents, and erroneously accepted the prosecutor's pronouncement that the defense had been given everything the prosecutor had, as satisfying the prosecutor's burden under the applicable legal authorities, petitioner was deprived of a fair trial. There is no way of knowing whether possibly exonerating material may have been contained in the notes in question. Petitioner should therefore be afforded a new trial.

CONCLUSION

For any or all of the foregoing reasons, certiorari should be allowed; and upon consideration of the merits, petitioner's conviction should be reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 80-1437, 80-1438

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NOBLE R. STARNES and CLIFFORD ROLAND,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Illinois, Benton Division.

No. 78-Cr-02018—**James L. Foreman**, Judge.

ARGUED NOVEMBER 7, 1980—DECIDED MARCH 20, 1981

Before CUMMINGS, WOOD, *Circuit Judges*, and CAMPBELL, *Senior District Judge.**

WOOD, *Circuit Judge.* Defendants Noble Starnes and Clifford Roland appeal from a jury verdict that found them guilty of violating 18 U.S.C. § 1962(d), a provision of the Racketeer Influenced and Corrupt Organizations Act (RICO). The indictment charged that Starnes and Roland violated RICO by conspiring to engage in a pattern of racketeering in connection with a scheme to commit arson with intent to defraud an insurer, in violation of Illinois law. The arson consisted of setting fire to a building that housed Tri-No Enterprises, Inc., a

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* Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

business of which Starnes was president. In addition, the jury found Roland guilty on a separate count of violating the Travel Act, 18 U.S.C. § 1952(a), by travelling across state lines to commit the arson.[1]

Defendants do not contest that they arranged to set the fire and that Starnes filed a claim for the resulting damages with Tri-No's insurer. Instead, Starnes and Roland argue that the evidence is insufficient to establish the intent necessary to sustain their convictions. Alternatively, they contend that if the requisite intent existed a RICO prosecution cannot be brought in connection with a single instance of arson. Defendants also argue that their rights were violated when the prosecution failed to procure for them handwritten notes allegedly taken by an FBI agent while questioning a witness. In addition, Starnes and Roland claim that the district judge was unfairly biased against them, and Starnes asserts that he failed to receive effective assistance of counsel. We affirm.

I.

In 1977, Roland operated a tavern in Gary, Indiana, and also conducted a legitimate demolition business. During December of that year, Roland told Gerald Shurman about a friend of Roland's who wanted to set fire to an office in Illinois in order to destroy records contained in the office. Shurman is a former policeman who was convicted of a felony prior to the events in this case. He had on occasion worked with Roland in the latter's demolition business. Roland offered Shurman approximately two thousand dollars in return for his services in setting the fire. Shurman enlisted the aid of

[1] Starnes was sentenced to six years imprisonment and fined $5000.00. Roland received the same sentence as Starnes on the RICO charge, and a concurrent term of five years imprisonment and $5000.00 fine on his conviction under the Travel Act.

an acquaintance, Donald Murphy,[2] and the two men met with Roland at the latter's tavern to work out the details for the destruction of the office. During the conversation at the tavern, Roland received and made telephone calls purportedly to the individual who wanted the office burned. Telephone toll records introduced at trial showed that the calls were made to and from a telephone subscribed by Starnes in Texas.

As a result of the meeting, Shurman, Murphy and Roland agreed to travel to southern Illinois where they would set the fire as discussed. They anticipated that the fire would be blamed on the United Mine Workers who were on strike in southern Illinois at the time. The union members worked for some of Tri-No's suppliers, but not directly for Tri-No. It was agreed that the fire had to be set soon, since there was news that the strike would end within a few days.

The three men purchased thirty gallons of flammable lacquer thinner with money supplied by Roland, and set out from Gary at dawn for their destination,[3] a building in the Royal Oaks business complex in Herrin, Illinois. Starnes greeted them when they arrived at the building. Shurman recognized Starnes as a person he had seen before with Roland at Roland's bar.

Starnes informed them that he wanted the entire building destroyed rather than just a single office. The men removed a number of items from the building and obtained additional flammable liquids. They delayed igniting the fire until darkness, leaving Starnes the opportunity to board an airplane flight out of state in order to establish an alibi. The fire then was set.

Starnes had increased his insurance coverage on the building shortly before the fire. Two of Tri-No's

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[2] Shurman and Murphy testified at trial. They were named with Roland in both Counts of the indictment. Shurman pleaded guilty to Count I. Murphy pleaded guilty to Count II. Charges on the remaining Count for each of the men were still pending at the time of trial.

[3] The exact destination apparently was kept from Shurman and Murphy until they were nearly there.

creditors testified that Tri-No was not paying its bills to them and that the creditors had filed suit to recover the money due.

II.

A. Roland first argues that his actions did not constitute a crime because, he says, the government did not prove that he helped set the fire with the intent to defraud an insurer, as required under relevant Illinois law. Ill. Rev. Stat. Chap. 38, § 20-1(b).[4] Starnes contends that he also did not have the requisite intent, and that even if he did he cannot be convicted of conspiracy since none of the others thought that the office fire was started for the purpose of defrauding Starnes's insurer. He argues that he cannot be convicted for conspiring to defraud an insurer with people who do not possess the requisite intent to commit the crime. Defendants' contentions thus depend on whether or not they possessed the intent required by law.

Circumstantial evidence may be used to prove a defendant's intent; indeed, that usually is the only evidence available to show intent. *United States* v. *Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977); *People* v. *Berland*, 74 Ill. 2d 286, 308 (1978) (arson case).

There was sufficient evidence to show Starnes's intent to defraud the insurance company. His business was in need of cash to pay its bills. Starnes, who was president of Tri-No, was well aware that the building was insured and that he recently had increased the insurance coverage. A successful fire was a convenient solution to

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[4] Ill. Rev. Stat. Chap. 38, § 20-1 ("Arson") provides, in pertinent part:

> A person commits arson when, by means of fire or explosive, he knowingly:
>
> * * *
>
> (b) With intent to defraud an insurer, damages any property or any personal property having a value of $150 or more.

his financial problems. He had an adjuster file a claim with the insurer after the fire, even though he was aware he had no basis for the claim under the policy since he was responsible for the fire being set. Taken together, this was ample evidence from which the jury could infer that Starnes possessed the requisite intent. *See generally, People* v. *Berland, supra,* 74 Ill. 2d at 308-09.

Our attention turns, then, to whether the evidence sustains the jury's determination that Roland organized the setting of the fire with intent to defraud an insurer and thus conspired with Starnes and the others as charged. As with Starnes, we conclude that the evidence was sufficient to sustain the jury verdict.

Shurman testified that he had seen Starnes and Roland at the latter's bar long before the arson was contemplated. Roland was the "middle man" in this operation and played the key role in obtaining the services of those who would set the fire. He was in telephone contact with Starnes while Shurman and Murphy laid plans with him for burning the office. This evidence suggests that Roland was privy to Starnes's reasons for setting the fire.

In addition to the evidence regarding Roland's relationship with Starnes, there are other circumstances from which the jury could infer Roland's criminal intent as charged. Roland was a businessman and it is reasonable to conclude that from his own experience he knew that commercial buildings usually are insured. The jury was justified in concluding that Roland would know that Starnes expected to recoup his losses on the building by collecting insurance money. Setting fire to a building, even if intended to be confined only to records in a single office, entails tremendous risk of financial loss, especially considering the amount of flammable liquid the conspirators originally purhcased. A jury could reasonably infer that it must have been obvious to Roland that Starnes would not be paying him to cause him (Starnes) great financial loss by burning his own business down for some farfetched public relations

gimmick, or any other reason, unless Starnes had insurance to cover the property loss and otherwise make it all financially worthwhile.

Moreover, several weeks after the blaze Roland told Shurman that the latter would receive full payment "after the insurance settlement was made on the building." The testimony does not suggest that either Shurman or Roland expressed surprise that an insurance claim was involved. Given Roland's business background, the context of his statement to Shurman supplies additional support for the jury's conclusion that Roland intended to defraud Starnes's insurer.

That Roland told Murphy and Shurman only that the United Mine Workers were to be blamed for the fire does not alter the sufficiency of the evidence as to his intent. Murphy and Shurman did not testify that blame was to be placed on the union solely for the purpose of making that organization look bad. Rather, their testimony more plausibly suggests that the strike provided a convenient cover for those who burned the Tri-No offices, diverting attention from the real reasons for the fire. That was why defendants had to move fast in order to take advantage of the timing of the strike, which was about to end.

The evidence sustains the jury's conclusion that Starnes and Roland intended to defraud Starnes's insurer when they conspired to set the fire.

B. Starnes and Roland argue that they could not have conspired to conduct a "pattern" of racketeering activity under RICO since a pattern requires at least two separate racketeering acts as defined by the statute. They contend that since the offense charged involves a single instance of arson no "pattern" of racketeering exists in this case.

Acts of racketeering under RICO include arsons punishable under state law by imprisonment for more than one year, 18 U.S.C. § 1961(1)(A), and crimes indictable under federal mail fraud laws or federal laws that prohibit interstate travel with intent to commit

arson, 18 U.S.C. § 1961(1)(B). Each of those acts is a separate instance of racketeering activity under RICO. When two or more of those acts are connected to each other in some logical manner so as to effect an unlawful end, a pattern of racketeering exists. 18 U.S.C. §§ 1961 (5), 1962(d). *E.g., United States* v. *Stofsky,* 409 F.Supp. 609, 614 (S.D.N.Y. 1973). *See United States* v. *Weatherspoon,* 581 F.2d 595, 601 n.2 (7th Cir. 1978). The RICO provisions are violated when there is a conspiracy to commit more than one of those acts, i.e., a pattern of racketeering directed at an enterprise's affairs.

Defendants' argument that RICO cannot apply to a conspiracy to commit a single arson ignores the statutory scheme just described. While there may indeed have been a single scheme or objective of the conspiracy—the arson —it turned out that several acts of racketeering were contemplated to achieve that objective. Under RICO, the conspiratorial *objective* is a matter different than the *acts* contemplated by the conspirators. Those acts in this case include Roland's travelling with Shurman and Murphy from Indiana to Illinois so they could set the fire in order to defraud the insurer; actually setting the fire in order to defraud the insurer; and then using the mails to complete the fraudulent scheme. Each is a separate act of racketeering.

This circuit previously has considered the position defendants advance. In *United States* v. *Weatherspoon, supra,* the defendant argued that all the mailings for which she was indicted under RICO arose from a single scheme to defraud the Veterans Administration, and thus were not a part of a "pattern" of racketeering. 581 F.2d at 601-02. The court disagreed, finding no support for the argument that RICO "requires[s] a showing of separate and unrelated schemes, as a precondition for finding two indictable 'acts' under 18 U.S.C. § 1341 [mail fraud] that would constitute a 'pattern of racketeering activity' under [RICO]." 581 F.2d at 601 n.2. Thus, the fact that there is but one objective underlying the separate acts does not diminish the applicability of RICO to those acts.

Other courts that have considered the application of the "pattern" provisions of RICO have interpreted the statute in the same manner as we do. For example, in *United States* v. *Chovanec*, 467 F.Supp. 41 (S.D.N.Y. 1979), the court concluded that a single objective to defraud a single victim constituted a RICO offense, when the objective was carried out through several incidents of wire fraud. 467 F.Supp. at 44. *Compare United States* v. *Parness*, 503 F.2d 430 (2d Cir. 1974) (interstate transport of stolen securities as part of single scheme to defraud). *Cf. United States* v. *Anderson*, 626 F.2d 1358, 1371 (8th Cir. 1980), *cert. denied*, ... U.S. ....., 49 U.S.L.W. 3617 (No. 80-766 Feb. 24, 1981) (dictum disapproving "The Government's view . . . [which] leads to the conclusion that almost any two criminal acts affecting interstate commerce would fall within the ambit of RICO").

We reject defendants' argument that the acts involved in this case do not support the jury's verdict that Starnes and Roland conspired to engage in a pattern of racketeering activity.

C. Defendants contend that there existed no legitimate enterprise in the affairs of which they participated as required by RICO.[5] Starnes and Roland argue that they conspired only to set the fire, which activity they seek to distinguish from participation in Tri-No's business affairs. Their association, they say, was for a wholly illegitimate purpose. Thus, defendants focus on an interpretation of RICO that would exclude associations for purely illegitimate purposes from the coverage of the statute. *Compare United States* v. *Aleman*, 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 445 U.S. 946

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[5] The pertinent RICO provision is contained in 18 U.S.C. § 1962(c), and reads as follows:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(1980) (RICO covers wholly illegitimate enterprises) *with United States* v. *Turkette,* 632 F.2d 896 (1st Cir. 1980), *cert. granted,* ..... U.S. ....., 49 U.S.L.W. 3525 (No. 80-808 Jan. 27, 1981) (RICO covers only infiltration of legitimate organizations).

The government maintains here, as it did at trial, that the "enterprise" involved in this case is Tri-No itself. The focus of the government's case is on the conspiracy as it affected Tri-No's business operations. Starnes participated directly in Tri-No's affairs, says the government, since he was president of the corporation and the arson conspiracy affected business property and insurance coverage. Roland was involved indirectly in Tri-No's affairs, the government contends, because the damage to the building was meant to affect the conduct of corporate business. The government argues that since this case was tried on the basis of the conspirators' participation in the affairs of a legitimate business, there is no reason to consider whether as association solely for illegitimate purposes falls within the terms of RICO. We agree with the government's position and conclude that the evidence is sufficient to establish that Starnes and Roland participated in Tri-No's affairs sufficiently to bring them within the grasp of RICO.[6]

The evidence shows Roland knew that the arson was meant in a literal way to affect the conduct of Tri-No's business. To begin with, Roland had known Starnes for some time and was aware from the start that it was Tri-No's office complex that was to be the site of the arson. It obviously is difficult to operate a business from a burned-out office. Even if we were to assume that the purpose of the arson was only to embarrass the striking union by placing blame for the fire upon it—as defendants argue and we reject—the conspiracy still

[6] Defendants would fare no better even if we accepted their promise that this case concerns the activities only of an illegitimate enterprise. As noted, this circuit has held that RICO covers the activities of a wholly unlawful association. *United States* v. *Aleman, supra,* 609 F.2d at 304-05. There is ample evidence to sustain the conviction on the basis of participation in an illegitimate undertaking.

would be directed to at least one aspect of Tri-No's business conduct: namely, its relations with union-staffed suppliers. As it is, the destruction of Tri-No's business property in order to unlawfully obtain an insurance settlement bears significantly on the corporation's affairs, especially in light of financial difficulties the firm was experiencing.

The participation in the conspiracy of people who were not on the legitimate payroll of Tri-No does not mean those people were not participating in its affairs. The nature of racketeering connections to an otherwise legitimate business suggests that elements outside a company may assist in obtaining the company's illegal goals. Thus "[t]he substantive proscriptions of the RICO statute apply to insiders *and outsiders*—those merely 'associated with' an enterprise—who participate directly *and indirectly* in the enterprise's affairs through a pattern of racketeering activity. [Citations omitted.] Thus, the RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise." *United States* v. *Elliott,* 571 F.2d 880, 903 (5th Cir.), *cert. denied sub nom., Delph* v. *United States,* 439 U.S. 953 (1978) (emphasis in original).

Tri-No was the enterprise involved in this case. Starnes participated in its affairs directly, including the arson, as the corporation's president. Roland's part in the conspiracy involved his role in Tri-No's unorthodox disposition of its business property and the corporation's resulting insurance claim. The acts of racketeering required the conspirators' direct and indirect participation in the conduct of Tri-No's affairs, and fell within the proscriptions of RICO.[7]

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[7] Starnes and Roland also contend that application of RICO penalties is inconsistent with the philosophy underlying a recent Supreme Court case considering the use of penalty enhancement provisions in the context of double jeopardy claims. As this court previously has noted, RICO is a penalty enhancement scheme unique unto itself and must be interpreted in the context of the evils it seeks to redress—racketeering activity indictable under separate laws. *United States* v. *Aleman,* 609 F.2d 298, 304, 306

(footnote continued)

D. Roland claims that he did not travel interstate with the requisite intent to promote the arson and thus his conviction under Count II of the indictment for a violation of the Travel Act cannot stand. The circumstances of the conspiracy as discussed earlier show that Roland travelled from Indiana to Illinois in order to set the fire with the intent to defraud Tri-No's insurer. There is sufficient evidence to support Roland's conviction under Count II of the indictment.

III.

A. Roland and Starnes contends that their rights were violated when the prosecution failed to turn over the original handwritten notes allegedly taken by an FBI agent during interviews with the government's witness, Shurman. The prosecutor apparently did not have the notes in his possession even if they still existed. Defendants contend that this violated their rights under the Jencks Act, 18 U.S.C. § 3500, and *Brady v. Maryland*, 373 U.S. 83 (1963). They argue that since the withholding of exculpatory evidence may be reversible error even if done by someone other than the prosecutor, the

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(footnote continued)

(7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980). *See generally* W. HURST, STATUTES IN COURT 141-43 (1970). Defendants' citation of *Busic* v. *United States*, 446 U.S. 398 (1980), is inapposite in this case.

The *Busic* case held that if a statute defining a felony provides for enhanced penalties for use of a weapon in committing the crime, a sentence given under that statute may not be further enhanced by application of separate statutory provisions permitting enhanced penalties generally for such use of a weapon. The Court in *Busic* did not question the penalty-enhancement provision as applied to the underlying felony. Nor did the Court question the constitutionality of the separate penalty-enhancement provision as applied to a felony law lacking its own enhancement clause. Double-enhancement is not present in this case. Rather, we deal here with a single statute aimed at enhancing the usual penalties available under state or federal law for acts associated with racketeering. *Aleman, supra*, 609 F.2d at 306-07. There is no *Busic* situation implied by the facts of this case.

prosecutor's statement was inadequate to safeguard their rights.

During his testimony, Shurman mentioned that Agent Little had taken notes while interviewing him. The formal FBI report on those interviews had been turned over to Roland and Starnes before trial. When defendants sought production of the original notes to supplement the single report already obtained, the prosecutor responded that "[t]hey have every piece of information that the United States Attorney's Office has, Your Honor, and [the single report is] the only one we have." The district judge then told counsel that "maybe we can have a hearing on it or something, out of the presence of the jury, of what to do if [the prosecutors] don't have it." There is no indication in the record that defendants ever sought such a hearing, and none was held. The record also does not disclose any other effort by defendants to discover whether or not the notes in fact existed, a doubt implied by the prosecutor's comment that he also did not have the notes. Agent Little was not called by the defense to answer questions on this matter, although the district court clearly presented that possibility to defendants. FBI Agent Dueker, the chief agent on the case, was called as a defense witness but he was not asked about the existence or whereabouts of the original notes.

There is nothing in this record that suggests the notes could be in some way material to issues involved in the case, as required under *Brady*. *See United States* v. *Crowell,* 586 F.2d 1029 (4th Cir. 1978). Nor did Roland and Starnes attempt to determine that the notes were still in existence and thus obtainable by the prosecutor. The record here is insufficient to establish an issue as to a violation of defendants' *Brady* rights. We decline to decide the question. *Cf. United States* v. *Gray,* 611 F.2d 194, 197 (7th Cir. 1979), *cert. denied,* 446 U.S. 911 (1980) (declining review where factual basis for constitutional claims not before district court).

The record does not support the contention that the notes would have been producible under the Jencks Act.

That Act would require production in this case only if the notes were a substantially verbatim transcript of Shurman's remarks, or were his own written statements adopted or approved by him. 18 U.S.C. § 3500(e). If anything, the record indicates that the notes did not fall within either category, and thus there was no error under the Jencks Act in defendants' failure to obtain the notes.

B. Starnes argues that he was denied the effective assistance of counsel. The only evidence of ineffective assistance to which he directs our attention is his counsel's jocular comment outside the presence of the jury during an instruction conference that Starnes's defense was "temporary insanity."

While Starnes is correct that loyalty and respect must underlie the attorney's relationship to his or her client, there is no indication that those qualities were not present in this case. The offending comment apparently was made to ease the course of a lengthy discussion on the propriety of certain jury instructions. It does not represent such an "utter perversion of the attorney-client relationship" that we need not consider counsel's actual trial performance. *Messelt* v. *Alabama*, 595 F.2d 247, 251 (5th Cir. 1979) (attempt by counsel to have additional charges brought against his client "in an effort to gain more leverage in collecting his fees").

The record taken as a whole does not indicate that Starnes's counsel lacked the expereince or ability to adequately represent Starnes so as to fail to meet the "minimum standard of professional representation." *United States ex rel. Williams* v. *Twomey*, 510 F.2d 634, 641 (7th Cir. 1975), *cert. denied sub nom., Sielaff* v. *Williams*, 423 U.S. 876 (1976); *United States* v. *Chaussee*, 536 F.2d 637 (7th Cir. 1976). To the contrary, the record shows that counsel conducted deft examination of the witnesses, was attentive to and took successful advantage of opportunities to object to the admission of damaging evidence, and presented the facts favoring his client in a thorough and professional manner during

opening statements and closing arguments. His statement during the instructions conference does not justify a finding that Starnes did not have the effective assistance of counsel at trial.

C. Defendants argue that the district judge's inquiry about the possibility of defendants' pleading guilty deprived them of a fair trial. The judge's comments were made out of hearing of the jury during a discussion of the admissibility of certain evidence. The claim of prejudice is without merit.

The district judge's first comment as to the possibility of a plea, to which he did not receive a clear reply, was directed at determining whether or not an extensive voir dire of Shurman would be necessary on the subject of payments made to him by Roland. The evidence was to apply to Roland on Count II of the indictment, which did not name Starnes. Shurman himself had not pleaded guilty on that Count, although he had pleaded guilty on Count I.

Judge Foreman was concerned that the evidence, which could be prejudicial to both Starnes and Shurman, should not be presented if a plea was in the offing. Nothing in the trial record or argument on appeal suggests that Judge Foreman was expressing a view on Roland's and Starnes's guilt.

Shortly after his first question regarding pleas (two pages later in the trial transcript and still out of the jury's hearing), Judge Foreman again asked whether a plea was likely. This was not unreasonable, since counsel had not answered him the first time and the evidentiary question had been only tentatively resolved.

While it is true that a judge's attitudes may have subtle as well as overt influence upon a jury, the record does not indicate the possibility of either sort of influence to the prejudice of defendants. Judge Foreman's remarks were made out of the jury's hearing, and the record indicates that his rulings throughout the trial were even-handed and solicitous of defendants' rights.

Thus, the case before us is unlike *United States* v. *Dellinger,* 472 F.2d 340, 386-89 (7th Cir. 1972), *cert. denied,* 410 U.S. 970 (1973), cited by defendants, where the judge's prejudicial comments were made before the jury, pervaded the trial, and were reflected in less than even-handed evidentiary and other rulings. *Compare Bollenbach* v. *United States,* 326 U.S. 607 (1946) (broad hints to jury, clearly prejudicial to the defendant, that they must quickly return a verdict rather than remain deadlocked).

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 21, 1981.

Before
Hon. Walter J. Cummings, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. William J. Campbell, Senior District Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Nos. 80-1437, 80-1438 vs.

NOBLE R. STARNES and CLIFFORD ROLAND,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Illinois, Benton Division.
No. 78-Cr-02018
James L. Foreman, *Judge.*

ORDER

On consideration of the petitions for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for the defendants-appellants Noble R. Starnes and Clifford Roland, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing.

IT IS ORDERED that the aforesaid petitions for rehearing be, and the same are hereby, DENIED.

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* Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.